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SENATE BILL 342

43RD LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 1998

INTRODUCED BY

SUE F. WILSON

AN ACT

RELATING TO WATER RIGHTS; ENACTING THE NEW MEXICO WATER BANKING ACT AND AMENDING SECTIONS OF THE NMSA 1978 TO CREATE AN AUTHORITY AND BOARD TO REGULATE WATER BANKING OF CONSERVED AND SURPLUS WATER AND TO ESTABLISH A FUND; MAKING AN APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. [NEW MATERIAL] SHORT TITLE. -- Sections 1 through 16 of this act may be cited as the "New Mexico Water Banking Act".

Section 2. [NEW MATERIAL] LEGISLATIVE PURPOSE. -- The purposes of the New Mexico Water Banking Act are to:

- A. make better and more extensive use of water resources in the state;
- B. encourage the conservation of water and ensure

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1 that conserved and surplus water is available for other uses
2 and users through transfers administered by the New Mexico
3 water bank authority;

4 C. permit greater access to known resources of
5 available water to water users who need additional supply;

6 D. amend water forfeiture statutes to delay their
7 application to water rights deposited in the water bank for
8 use by others who have current needs for water resources;

9 E. permit public uses of unused, conserved or
10 surplus water rights for the benefit of the public interest;

11 F. provide a market conduit for unused, conserved
12 or surplus water rights and resources;

13 G. provide an alternative to forfeiture for
14 unused, unneeded or conserved water rights by permitting
15 transfers administered by the New Mexico water bank board; and

16 H. promote economic development in the state by
17 providing alternative water availability solutions for
18 agricultural, environmental, municipal, industrial,
19 commercial, recreational and residential interests in the
20 state.

21 Section 3. [NEW MATERIAL] DEFINITIONS. --As used in the
22 New Mexico Water Banking Act:

23 A. "authority" means the New Mexico water bank
24 authority;

25 B. "board" means the New Mexico water bank board;

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1 C. "deposit" means the placement of a water right
2 or portion of a water right in the New Mexico water bank for
3 transfer;

4 D. "depositor" means the owner of a water right
5 who deposits the water right or a portion of the water right
6 in the New Mexico water bank;

7 E. "transfer" means the conveyance of a water
8 right or a portion of a water right by sale or lease;

9 F. "water bank" or "bank" means the New Mexico
10 water bank;

11 G. "water right" means a right acquired or
12 authorized pursuant to the laws of this state to impound,
13 divert or use surface water or ground water to the extent
14 authorized by law; and

15 H. "withdrawal" means the removal of a deposit in
16 the water bank by the depositor.

17 Section 4. [NEW MATERIAL] NEW MEXICO WATER BANK BOARD--
18 CREATION-- APPOINTMENT-- QUALIFICATIONS-- TERMS-- EX-OFFICIO
19 MEMBERS. --

20 A. The "New Mexico water bank board" is
21 established to administer the New Mexico Water Banking Act
22 through the New Mexico water bank authority.

23 B. The board shall be composed of seven public
24 members appointed by the governor for four-year terms whose
25 service on the board shall be without compensation except for

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1 expense reimbursement made in accordance with the Per Diem and
2 Mileage Act. For initial terms, two members of the board
3 shall be appointed for four-year terms, two members shall be
4 appointed for three-year terms and three members shall be
5 appointed for two-year terms. Thereafter, all appointments
6 shall be for four-year terms. Members shall be chosen for
7 their expertise and experience in water rights and water
8 resources fields. Each member shall reside in a geographic
9 area of the state different from each other member. No more
10 than four of the members shall be of the same political party.
11 Members may serve two terms and shall remain in office until
12 their respective successors have been appointed and have
13 agreed to serve. The members shall annually elect a member to
14 serve as chairman of the board.

15 C. The state engineer, chairman of the interstate
16 stream commission, secretary of environment, speaker of the
17 house of representatives and president pro tempore of the
18 senate, or each of their respective designees, shall be ex-
19 officio members of the board, without vote.

20 Section 5. [NEW MATERIAL] NEW MEXICO WATER BANK
21 AUTHORITY ESTABLISHED-- EMPLOYMENT AND DISCHARGE OF DIRECTOR--
22 EMPLOYEES. --

23 A. The "New Mexico water bank authority" is
24 established under the direction of the board.

25 B. The board shall appoint and fix the salary of a

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1 full-time director who shall serve at the pleasure of the
2 board and, pursuant to the direction of the board, the
3 director shall employ such employees of the authority as are
4 proper and necessary and prescribe their duties and
5 compensation.

6 Section 6. [NEW MATERIAL] NEW MEXICO WATER BANK BOARD
7 AND AUTHORITY--POWERS AND DUTIES.--The authority, acting at
8 the direction of the board, shall:

- 9 A. administer, implement and enforce the New
10 Mexico Water Banking Act;
- 11 B. administer, operate and regulate the water
12 bank;
- 13 C. encourage water rights owners to implement
14 water conservation practices;
- 15 D. educate the public, including political
16 subdivisions of the state, about the water bank and the
17 benefits of depositing conserved or surplus water in the bank;
- 18 E. establish requirements for a deposit of a water
19 right or portion of a water right into the water bank,
20 including:
 - 21 (1) terms and conditions for deposit and
22 withdrawal, including the procedure and penalties for early
23 withdrawal;
 - 24 (2) the procedure for determining eligibility
25 of water rights for deposit;

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1 (3) the procedure and formula to quantify
2 water rights to be deposited;

3 (4) the eligibility of water rights for
4 deposit considering legal entitlement, ownership, validity,
5 recent historical use and absence of legal restrictions;

6 (5) the priority order, if any, of water
7 rights to be sold by the bank; and

8 (6) monitoring to determine and penalties for
9 improper use of deposited or transferred water;

10 F. facilitate the transfers of water rights from
11 the water bank for future beneficial use, including:

12 (1) making annual determinations of available
13 deposited water to be transferred;

14 (2) making annual determinations of the fees
15 for transfer of deposited water;

16 (3) establishing the formula to calculate the
17 annual pro rata interest of each depositor in transfers made
18 during the previous year and computing each depositor's
19 entitlement of proceeds;

20 (4) negotiating the terms of a transfer;

21 (5) maintaining a registry of deposits and
22 persons who have registered with the bank and identifying a
23 beneficial use for additional water supplies; and

24 (6) informing persons listed on its registry
25 about water rights available from the bank;

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1 G. purchase, hold and sell water rights in its own
2 name;

3 H. negotiate and contract for or acquire the use
4 of existing surface facilities or reservoirs to store
5 deposited water not transferred during any year of its term of
6 deposit;

7 I. determine compliance with the necessary
8 standards for stored water considering the obligations of the
9 board and authority pursuant to surface storage reservoir
10 contracts, if any;

11 J. establish injection standards, in conjunction
12 with other state agencies having authority regarding water
13 injection schemes or water quality, for deposited water to be
14 injected, through direct surface or direct subsurface methods,
15 into underground aquifers;

16 K. subject to Sections 13 and 14 of the New Mexico
17 Water Banking Act, establish fees to be paid to the water bank
18 fund for transfers and the administrative and operational
19 costs of the bank, board and authority;

20 L. establish procedures for making, transferring
21 or withdrawing a deposit; determining the priority of
22 transfers, the reports and records of a transfer and the fees
23 associated with transfers; and other actions;

24 M report annually to the legislature regarding
25 deposits, withdrawals and transfers made, identifying the

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1 number of persons and water rights involved in all deposits,
2 withdrawals and transfers; existing and anticipated future
3 storage needs of the water bank; and other operations of the
4 bank, board and authority;

5 N. promulgate rules to implement the New Mexico
6 Water Banking Act and to administer, operate and regulate the
7 water bank;

8 O. contract with any person to achieve or further
9 the purposes of the New Mexico Water Banking Act;

10 P. file suit in its own name and be sued; and

11 Q. take all other actions necessary or advisable
12 to facilitate deposits and transfers and to achieve or further
13 the purposes of the New Mexico Water Banking Act.

14 Section 7. [NEW MATERIAL] NEW MEXICO WATER BANKING ACT
15 EXCLUSIVE. -- Water rights shall not be banked or eligible for
16 storage in either surface facilities or reservoirs or
17 underground aquifers in this state, except in accordance with
18 the New Mexico Water Banking Act and authorizations of law,
19 compacts or contracts of the state valid on the effective date
20 of the New Mexico Water Banking Act; provided that the water
21 bank may accept water rights of Indian nations, tribes or
22 pueblos for banking and storage in accordance with the terms
23 of that act.

24 Section 8. [NEW MATERIAL] DEPOSITED WATER RIGHTS-- USES--
25 REVERSION TO PUBLIC WATER-- PUBLIC INTEREST USE. --

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1 A. In accordance with rules promulgated by the
2 board, a water right or portion of a water right deposited in
3 the water bank during the term of the deposit may:

4 (1) not be used by the depositor, his heirs,
5 successors or assignees;

6 (2) be transferred, stored or used for public
7 interest uses by the bank in accordance with the New Mexico
8 Water Banking Act and rules of the board; or

9 (3) be withdrawn by the depositor in
10 accordance with the New Mexico Water Banking Act, the rules of
11 the board and the terms of the deposit.

12 B. In any event, unless sold by the bank on behalf
13 of the depositor or withdrawn by the depositor in accordance
14 with the New Mexico Water Banking Act, the rules of the board
15 and the terms of the deposit, a deposited water right reverts
16 to the status of unappropriated public water subject to state
17 administration over public waters and subsequent appropriation
18 for beneficial use at the expiration of the term of the water
19 right deposit.

20 C. During the term of the deposit, water that is
21 neither transferred nor stored during any year may be used for
22 in-stream releases, environmental, recreational, flushing or
23 other public interest uses, as determined by the board;
24 provided that the public interest use shall not interfere with
25 any obligation, compact or other interest of the state.

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1 Section 9. [NEW MATERIAL] STORAGE IN SURFACE FACILITIES
2 AND RESERVOIRS AND RECOVERY OF DEPOSITED WATER. --The board,
3 through the authority, may store deposited water in existing
4 surface facilities or reservoirs in the state during the term
5 of the deposit. The board shall promulgate rules to implement
6 storage and recovery of deposited water in and from surface
7 facilities and reservoirs for transfers, alternative surface
8 storage, public interest uses, ground water storage and
9 conversion to bank ownership, withdrawal or reversion to public
10 water.

11 Section 10. [NEW MATERIAL] STORAGE AND RECOVERY OF
12 DEPOSITED WATER IN UNDERGROUND AQUIFERS--BANK- OWNED WATER. --In
13 any year of a deposit term, the bank may store available
14 deposited water, unneeded during that year for transfers or
15 public interest uses, in underground aquifers. Upon being
16 stored in an underground aquifer, through direct or indirect
17 surface or direct subsurface methods, the water is deemed
18 abandoned by the depositor and converted to bank ownership for
19 subsequent recovery by the bank for sale, lease, public
20 interest or other use by the bank, without compensation, credit
21 or proceeds paid to or for the depositor. The water bank shall
22 not use water converted to bank ownership under the provisions
23 of this section in competition with or in any manner
24 detrimental to its obligations or responsibilities to
25 depositors and deposited water rights.

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1 Section 11. [NEW MATERIAL] PRESUMPTION OF NON-
2 IMPAIRMENT. --A transfer of a deposited water right for any
3 year, during the term of the deposit, by the board through the
4 authority, shall create a rebuttable presumption that the
5 transfer does not impair existing water rights and is neither
6 contrary to the conservation of water within the state nor
7 detrimental to the public welfare of the state. Unless the
8 state engineer objects to the transfer within ten days of
9 written notice of the intended transfer by the board to the
10 state engineer, the transfer is deemed approved by the state
11 engineer, and the transfer may occur, subject only to objection
12 by an objector substantially and specifically affected by the
13 one-year transfer of the deposited water right. Upon any
14 objection, the transfer shall be reviewed by the state
15 engineer, who shall provide his findings to the board about the
16 transfer and the objection. If the state engineer objects to
17 the transfer or determines that the transfer may adversely
18 affect the objector, the board shall rescind or modify the
19 transfer to avoid any adverse effect on the objector's water
20 right.

21 Section 12. [NEW MATERIAL] DEPOSITS-- EXEMPT FROM
22 FORFEITURE. --A water right, eligible for deposit as determined
23 by board rule, may be deposited in the water bank for a term of
24 up to ten years and may be transferred annually during the
25 deposit term, pursuant to the terms of the New Mexico Water

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1 Banking Act and rules promulgated thereunder. During the
2 deposit term, a deposited water right is exempt from forfeiture
3 pursuant to Sections 72-5-28, 72-6-3 and 72-12-8 NMSA 1978.

4 Section 13. [NEW MATERIAL] FEES AND REPORTS. --

5 A. Fees shall be imposed on each transfer of water
6 rights on deposit with the water bank for:

7 (1) administration and operation of the water
8 bank; and

9 (2) each transfer of deposited water rights.

10 B. By rule, the board shall set:

11 (1) the administration and operation fees to
12 be charged to and paid by the transferee of each deposited
13 water right to the bank;

14 (2) annually, the transfer fees to be paid by
15 the transferee to the bank, considering the type and duration
16 of the transfer and the amount, quality and intended use of the
17 deposited water rights to be transferred; and

18 (3) the percentage of the transfer fee to be
19 paid over to the depositor for the transfer made and the
20 percentage of the transfer fee retained by the bank for making
21 the transfer.

22 C. By rule, the board shall establish the procedures
23 for setting the fees imposed by this section and procedures for
24 the calculation and payment of the percentage of the transfer
25 fee to be paid over to the depositor.

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1 D. Fees shall not be imposed or paid for public
2 interest uses of deposited water rights made pursuant to
3 Subsection B of Section 8 of the New Mexico Water Banking Act.

4 Section 14. [NEW MATERIAL] WATER BANK FUND CREATED--
5 FUNDING.--There is created in the state treasury the "water
6 bank fund" to be used solely for the administration and
7 operation of the water bank by the board and the authority.
8 The water bank fund is to be financed by appropriations from
9 the general fund to the board, fees assessed and collected by
10 the board in administering the New Mexico Water Banking Act
11 and such other financing as is permitted by law. Income or
12 interest earned on the investment of the fund shall remain in
13 the fund. Money shall be expended pursuant to warrant issued
14 by the department of finance and administration pursuant to
15 vouchers signed by the director of the authority. Any
16 unexpended or unencumbered balance of the water bank fund shall
17 not revert to the general fund, but shall remain on deposit in
18 the fund for administrative and operating costs of the water
19 bank.

20 Section 15. [NEW MATERIAL] OTHER TRANSFERS.--Nothing in
21 the New Mexico Water Banking Act shall prevent the sale or
22 purchase of water or water rights by or through persons other
23 than the board or authority to the extent permitted by and in
24 accordance with law.

25 Section 16. [NEW MATERIAL] CONSERVATION OF WATER RIGHTS.--

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1 Subject to Section 7 of the New Mexico Water Banking Act, the
2 amount of water rights conserved by a water right owner may be
3 deposited in the water bank in the amount conserved, subject
4 further to board rule establishing eligibility terms for the
5 conserved water deposit and the calculation of the water
6 conserved.

7 Section 17. Section 72-5-28 NMSA 1978 (being Laws 1907,
8 Chapter 49, Section 42, as amended) is amended to read:

9 "72-5-28. FAILURE TO USE WATER--FORFEITURE. --

10 A. When the party entitled to the use of water fails
11 to beneficially use all or any part of the water claimed by him,
12 for which a right of use has vested for the purpose for which it
13 was appropriated or adjudicated, except the waters for storage
14 reservoirs, for a period of four years, such unused water shall,
15 if the failure to beneficially use the water persists one year
16 after notice and declaration of nonuser given by the state
17 engineer, revert to the public and shall be regarded as
18 unappropriated public water; provided, however, that forfeiture
19 shall not necessarily occur if circumstances beyond the control
20 of the owner have caused nonuse, such that the water could not
21 be placed to beneficial use by diligent efforts of the owner;
22 and provided that periods of nonuse when irrigated farm lands
23 are placed under the acreage reserve program or conservation
24 reserve program provided by the Food Security Act of 1985, P.L.
25 99-198 shall not be computed as part of the four-year forfeiture

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1 period; and provided, further, that the condition of notice and
2 declaration of nonuser shall not apply to water [~~which~~] that has
3 reverted to the public by operation of law prior to June 1,
4 1965.

5 B. Upon application to the state engineer at any time
6 and a proper showing of reasonable cause for delay or for nonuse
7 or upon the state engineer finding that it is in the public
8 interest, the state engineer may grant extensions of time, for a
9 period not to exceed three years for each extension, in which to
10 apply to beneficial use the water for which a permit to
11 appropriate has been issued or a water right has vested, was
12 appropriated or has been adjudicated.

13 C. Periods of nonuse when water rights are acquired
14 by incorporated municipalities or counties for implementation of
15 their water development plans or for preservation of municipal
16 or county water supplies shall not be computed as part of the
17 four-year forfeiture statute.

18 D. A lawful exemption from the requirements of
19 beneficial use, either by an extension of time or other
20 statutory exemption, stops the running of the four-year period
21 for the period of the exemption, and the period of exemption
22 shall not be included in computing the four-year period.

23 E. Periods of nonuse when the nonuser of acquired
24 water rights is on active duty as a member of the armed forces
25 of this country shall not be included in computing the four-year

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1 period.

2 F. The owner or holder of a valid water right or
3 permit to appropriate waters for agricultural purposes
4 appurtenant to designated or specified lands may apply the full
5 amount of water covered by or included in the water right or
6 permit to any part of [~~sueh~~] the designated or specified tract
7 without penalty or forfeiture.

8 G. Periods of nonuse when water rights are acquired
9 and placed in a state engineer-approved water conservation
10 program by a conservancy district organized pursuant to Chapter
11 73, Articles 14 through 19 NMSA 1978, an acequia or community
12 ditch association organized pursuant to Chapter 73, Article 2 or
13 3 NMSA 1978, an irrigation district organized pursuant to
14 Chapter 73, Articles 9 through 13 NMSA 1978 or the interstate
15 stream commission shall not be computed as part of the four-year
16 forfeiture period.

17 H. Periods when water rights are deposited in the New
18 Mexico water bank pursuant to the New Mexico Water Banking Act
19 shall not be computed as part of the four-year forfeiture
20 period. "

21 Section 18. Section 72-12-8 NMSA 1978 (being Laws 1931,
22 Chapter 131, Section 8, as amended) is amended to read:

23 "72-12-8. WATER RIGHT FORFEITURE. --

24 A. When for a period of four years the owner of a
25 water right in any of the waters described in Sections 72-12-1

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1 through 72-12-28 NMSA 1978 or the holder of a permit from the
2 state engineer to appropriate any such waters has failed to
3 apply them to the use for which the permit was granted or the
4 right has vested, was appropriated or has been adjudicated, the
5 water rights shall be, if the failure to beneficially use the
6 water persists one year after notice and declaration of nonuser
7 given by the state engineer, forfeited and the water so unused
8 shall revert to the public and be subject to further
9 appropriation; provided that the condition of notice and
10 declaration of nonuser shall not apply to water [~~which~~] that has
11 reverted to the public by operation of law prior to June 1,
12 1965.

13 B. Upon application to the state engineer at any time
14 and a proper showing of reasonable cause for delay or for nonuse
15 or upon the state engineer finding that it is in the public
16 interest, the state engineer may grant extensions of time, for a
17 period not to exceed three years for each extension, in which to
18 apply to beneficial use the water for which a permit to
19 appropriate has been issued or a water right has vested, was
20 appropriated or has been adjudicated.

21 C. Periods of nonuse when irrigated farm lands are
22 placed under the acreage reserve program or conservation reserve
23 program provided by the Food Security Act of 1985, P.L. 99-198
24 shall not be computed as part of the four-year forfeiture
25 period.

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1 D. Periods of nonuse when water rights are acquired
2 and placed in a state engineer-approved water conservation
3 program by an artesian conservancy district, a conservancy
4 district, an acequia or ~~community~~ ditch association organized
5 pursuant to Chapter 73, Article 2 or 3 NMSA 1978, an irrigation
6 district organized pursuant to Chapter 73, Articles 9 through 13
7 NMSA 1978 or the interstate stream ~~commission~~ shall not be
8 computed as part of the four-year forfeiture statute.

9 E. A lawful exemption from the requirements of
10 beneficial use, either by an extension of time or other
11 statutory exemption, stops the running of the four-year period
12 for the period of the exemption, and the period of exemption
13 shall not be included in computing the four-year period.

14 F. Periods of nonuse when water rights are acquired
15 by incorporated municipalities or counties for implementation of
16 their water development plans or for preservation of municipal
17 or county water supplies shall not be computed as part of the
18 four-year forfeiture statute.

19 G. Periods of nonuse when the nonuser of acquired
20 water rights is on active duty as a ~~member~~ of the armed forces
21 of this country shall not be included in computing the four-year
22 period.

23 H. The owner or holder of a valid water right or
24 permit to appropriate waters for agricultural purposes
25 appurtenant to designated or specified lands may apply the full

1 amount of water covered by or included in that water right or
2 permit to any part of the designated or specified tract without
3 penalty or forfeiture.

4 I. Periods when water rights are deposited in the New
5 Mexico water bank pursuant to the New Mexico Water Banking Act
6 shall not be computed as part of the four-year forfeiture
7 period. "

8 Section 19. APPROPRIATION. --Two hundred fifty thousand
9 dollars (\$250,000) is appropriated from the general fund to the
10 water bank fund for expenditure in fiscal year 1999 and
11 subsequent fiscal years by the New Mexico water bank board for
12 the purpose of carrying out the provisions of the New Mexico
13 Water Banking Act. Any unexpended or unencumbered balance
14 remaining at the end of any fiscal year shall not revert to the
15 general fund.

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1 FORTY-THIRD LEGISLATURE

2 SECOND SESSION, 1998

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6 February 5, 1998

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8 Mr. President:

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10 Your COMMITTEES' COMMITTEE, to whom has been referred

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12 SENATE BILL 342

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14 has had it under consideration and finds same to be GERMANE,
15 pursuant to Senate Executive Message No. 43, and thence referred to
16 the CONSERVATION COMMITTEE.

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19 Respectfully submitted,

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25 Manny M. Aragon, Chairman

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(Chief Clerk)

(Chief Clerk)

Date _____

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